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The Federal Antitrust Laws and Radius Clauses in Shopping Center Leases

By ADRIENNE J. MARSH*

The decades of the 1960's and 1970's may well be viewed as the golden age of the shopping center.¹ Mirroring the massive population shift from downtown urban areas to the suburbs, regional shopping centers and malls virtually have replaced traditional "downtown" shopping areas in providing bedroom community residents with an "integration of all retail and commercial functions of modern life and the activities that people are involved in: entertainment, recreation, health, shopping, eating, education."² Indeed, by 1976, shopping centers in America accounted for at least forty-four percent of all retail sales, excluding automotive and building centers.³

In the face of such a significant role, there is growing concern

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1. A "shopping center" is defined as a "group of commercial establishments, planned, developed, owned and managed as a unit related in location, size and type of shops to the trade area that the unit serves; it provides on-site parking in definite relationship to the types and sizes of stores." URBAN LAND INSTITUTE, *THE COMMUNITY BUILDERS HANDBOOK* 264 (1968), quoted in Eagle, *Shopping Center Control: The Developer Beseiged*, 51 J. URB. L. 585, 585 n.1 (1974) [hereinafter cited as Eagle]. Three categories of shopping centers have emerged, distinguished more by their function and major tenants than by their size: the neighborhood, the community, and the regional center. *Id.* The neighborhood center provides for the day to day needs of the neighborhood and usually has a gross leasable area of 50,000 square feet and a supermarket as its primary tenant. *Id.* at 585-86 & n.1. The community center has a gross leasable area of 100,000 to 300,000 square feet, and its major tenant usually is a junior department store, a variety store, or a discount store. *Id.* The regional shopping center usually is built around at least one full-line department store and has a gross leasable area of 300,000 to 1,000,000 square feet. *Id.*

2. BUSINESS WEEK, Sept. 4, 1971, at 34 (quoting James W. Rouse, developer).

3. FORBES, June 1, 1976, at 35, cited in Schear & Sheehan, *Restrictive Lease Clauses and the Exclusion of Discounters from Regional Shopping Centers*, 25 EMORY L.J. 609, 609 n.3 (1976) [hereinafter cited as Schear & Sheehan].

within the shopping center industry that various restrictive covenants customarily included in shopping center leases will be increasingly subject to attack on antitrust grounds by both the government and private parties.⁴ The most typical of these restrictive covenants⁵ are: "approval clauses," which provide the center's major tenants with the right to approve other tenants;⁶ clauses that provide the right of the major tenant or the developer to control the quality and price of the goods to be offered by lessees;⁷ "exclusive clauses" whereby the landlord agrees not to lease to any competitor of a tenant;⁸ and "radius clauses," which over a set period prohibit the tenant from opening another retail operation within a specified distance from the leased premises.⁹

This Article examines the potential application of federal anti-

4. See *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*, 308 F. Supp. 988 (D.D.C.), *aff'd*, 429 F.2d 206 (D.C. Cir. 1970); *Rouse Co.*, 85 F.T.C. 848 (1975); *Tysons Corner Regional Shopping Center*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,532 (F.T.C. 1974); *Gimbel Bros., Inc.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,478 (F.T.C. 1973).

5. Other restrictive clauses in a shopping center lease require tenants to be open during specified hours, forbid alterations or the use of signs or advertisements visible to the mall without the developer's approval, and require tenants to join and support the merchants' association. *Eagle*, *supra* note 1, at 615. Tenants also may be required to time the opening of their stores to that of the shopping center, to carry on business continuously through the term of the lease, and to restrict use of the premises to specified purposes in order to ensure the proper mix of goods and services within the center. Note, *The Shopping Centre Lease*, 35 U. TORONTO FACULTY L. REV. 107, 110 (1977).

6. See, e.g., *Tysons Corner Regional Shopping Center*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,532 (F.T.C. 1974); *Gimbel Bros., Inc.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,478 (F.T.C. 1973). But see *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*, 308 F. Supp. 988 (D.D.C.), *aff'd*, 429 F.2d 206 (D.C. Cir. 1970). The right of approval clause was proscribed in the consent decree against the Tysons Corner Regional Shopping Center. 3 TRADE REG. REP. (CCH) ¶ 20,933, at 20,774 (F.T.C. 1975). See notes 128-34 & accompanying text *infra*. Major tenants usually justify their demands for right of approval clauses by the need to protect the "image" of the shopping center in order to attract customers. *Schear & Sheehan*, *supra* note 3, at 612.

7. See, e.g., *Rouse Co.*, 85 F.T.C. 848 (1975). This category includes "no discount" clauses which restrict the availability of mall leases to discount stores. The significance of "no discount" clauses recently has diminished. Major tenants now can expect exclusion of discounters by developers who tacitly understand that to admit discounters might displease the major tenant on whom the developer depends. Furthermore, discounters often voluntarily refrain from locating in a regional mall. See *Schear & Sheehan*, *supra* note 3, at 621-30.

8. An "exclusive" clause may limit the competition in a particular product. See *Eagle*, *supra* note 1, at 614 n.209; *Lentzner*, *The Antitrust Implications of Radius Clauses in Shopping Center Leases*, 55 J. URB. L. 1, 2 n.4, 34 n.117 (1977) [hereinafter cited as *Lentzner*].

9. *Lentzner*, *supra* note 8, at 2. For examples of radius clauses, see *id.* at 2 n.5. Among the typically used restrictive clauses, radius clauses most clearly favor the developer.

trust laws to radius clauses, particularly in regional shopping center leases.¹⁰ The Article advocates that antitrust challenges of radius clauses should be analyzed under a rule of reason,¹¹ giving special consideration to the reasonableness of the covenant's terms, the size of the shopping center, the existence of alternative sites of competition, and the availability of a less restrictive clause.¹² In this regard the Article differs from, and in some measure responds to, the suggestion by the commentators that radius clauses be treated as per se violations of the antitrust laws.¹³ The Article concludes that in applying antitrust laws, a regional shopping center should be viewed as a joint venture whose uniqueness as a business enterprise dictates special relationships among the developer, the major tenants, and the satellite tenants.¹⁴

The Need for Radius Clauses: A Question of Finance

In order to appreciate the importance of the radius clause to developers, one must first understand the problems in financing a shopping center. Because of its size, a regional shopping center requires vast amounts of capital outlay. The funding problem is exacerbated by higher construction costs per square foot for a regional shopping center than for a smaller, less sophisticated shopping center.¹⁵ In order to attract the necessary investment

10. Regional shopping centers are especially vulnerable to federal antitrust challenges for three reasons. Because of their size and the tenants who operate interstate, the interstate commerce element of federal law is more readily resolved. See notes 46-61 & accompanying text *infra*. Secondly, exclusion from a regional center effectively may bar a retailer from the entire trade area because often there is only one regional center in a particular trade area. See Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201, 1208-09 (1973) [hereinafter cited as *Antitrust Implications*]. The "trade area" of a shopping center is "that area from which is obtained the major portion of the continuing patronage necessary for steady support of the shopping center." URBAN LAND INSTITUTE, *THE COMMUNITY BUILDERS HANDBOOK* 264 (1968), quoted in Eagle, *supra* note 1, at 625 n.279. The regional center thus may be deemed an essential outlet for retailers. Denial of an essential resource to competitors may be an antitrust violation. Finally, the guidelines established by FTC consent decrees, see note 136 & accompanying text *infra*, apply only to larger shopping centers.

11. See notes 62-63 & accompanying text *infra*.

12. See notes 170-91 & accompanying text *infra*.

13. Lentzner, *supra* note 8, at 61-66.

14. See notes 155-62 & accompanying text *infra*.

15. In one study the estimated cost per square foot of a regional shopping center was \$35 while that for a neighborhood center was \$19. See Lentzner, *supra* note 8, at 13 n.30.

capital, the developer of a regional shopping mall must turn to major lending institutions.¹⁶ To assure themselves of the venture's economic viability, the major lending institutions place a variety of conditions upon their loans.¹⁷ For example, where a larger shopping center is involved, the lending institution typically requires the signing of a certain number of Triple-A tenants¹⁸ to long-term leases. It therefore is critical that the developer sign at least one major department store to a long-term lease.¹⁹ In fact, to induce a department store to locate at the mall, the developer will often incur a financial loss on the major tenant's long-term lease.²⁰

Although the major department store generates the financial backing and attracts both smaller retailers and consumers to the shopping center, the developer looks to the smaller retailers for its profits.²¹ The minimum base rentals charged to smaller retailers

The developer initially obtains a short-term construction loan which is replaced, after construction is completed, by a long-term mortgage loan. *Id.*

16. See generally *id.* at 12-13.

17. See *id.* at 13-14. See generally Eagle, *supra* note 1, at 616 n.227.

18. A "Triple-A tenant" has a net worth of \$1,000,000 or more and is usually at least a medium-sized chain with several units. Lentzner, *supra* note 8, at 13 n.33. The ability to attract the full-line department stores is especially important to the financing institution, and therefore to the developer of a regional center. *Id.* at 13-14.

19. The major department store provides security both by virtue of the long-term lease and by its power to draw other retailers and customers to the shopping center. *Id.* at 13-14. Although it has been suggested that having smaller tenants purchase lease insurance is an alternative to depending on Triple-A tenants for the security demanded by financing institutions, see *Antitrust Implications*, *supra* note 10, at 1205, cited in Schear & Sheehan, *supra* note 3, at 612 n.18, such smaller tenants could not provide the "drawing power" of a major department store. Thus a major tenant's importance to the ultimate economic success of the regional shopping center gives it a great deal of bargaining power with the developer. See note 87 *infra*.

20. See Eagle, *supra* note 1, at 591 n.41. See generally Lentzner, *supra* note 8, at 13-14. Normally, "anchor tenant" leases contain the lowest rental rates in the shopping center. Eagle, *supra* note 1, at 600. One study found that annual rent per foot of gross leasable area in regional shopping centers was \$1.46 for national department stores but \$6.00 or more for local card and gift shops. *Id.* at 600 n.106. Rentals per square foot vary directly with the size of the store but inversely with the customer drawing power, sales volume per square foot of gross leasable area, and choice location of the store. *Id.* at 601 n.111. Rent differentials in shopping center leases have been held not violative of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976), because a lease is not a commodity sold within the meaning of the Act. *Plum Tree, Inc. v. N.K. Winston Corp.*, 351 F. Supp. 80, 86-87 (S.D.N.Y. 1972). See *Antitrust Implications*, *supra* note 10, at 1206 n.19.

Lower rental rates are not the sole incentive used to induce major tenants to sign long-term leases; a variety of costly concessions may be granted. See generally Eagle, *supra* note 1, at 600; Lentzner, *supra* note 8, at 13 n.35; Pollack, *Clauses in a Shopping Center Lease*, PRAC. LAW., May, 1970, at 38.

21. See Lentzner, *supra* note 8, at 14. See also Eagle, *supra* note 1, at 591 n.41.

are designed to recapture the developer's initial capital outlay.²² It is the percentage lease,²³ however, in which rent is based at least in part on sales volume, that creates the developer's profits. This reliance upon percentage leases invites the use of radius clauses.²⁴ Indeed, "[t]he radius clause is . . . primarily a safety mechanism to protect the landlord's share of percentage rent"²⁵ based on the volume of sales at the leased premises.

Developers may fear that a tenant opening another nearby outlet would reduce volume at the original store, thereby diminishing the return on the percentage rental.²⁶ At least one commentator has suggested that the fear of reduced rental revenues is unfounded because "imprudent over-expansion also has a deleterious impact on the tenant's business."²⁷ This suggestion, however, ignores the possibility that what may seem to be prudent expansion will after the fact turn out to be just the contrary.²⁸ Thus, should a tenant overexpand and both outlets fare poorly, the developer's revenues would be diminished.

The use of radius clauses may also be justified on the ground that the opening of a second outlet near the regional center reduces customer traffic throughout the mall, thereby diminishing the developer's percentage rentals from the other tenants. Unlike the older downtown shopping centers which grew randomly, shopping centers are developed and designed as "single, integrated retail communit[ies]."²⁹ To provide comprehensive one-stop shop-

22. Lentzner, *supra* note 8, at 14. The total base rentals from all tenants must cover all cash expenditures, including taxes, insurance, interest, amortization of principal, and maintenance costs. *Id.* at 13 nn.34, 38; see also Rogers & Brown, *Shopping Center Financing*, 43 U. MO. KAN. CITY L. REV. 1, 5 (1974).

23. In the usual shopping center percentage lease, the tenant agrees to pay a fixed base rental, plus a surcharge rental based upon a stated percentage of the tenant's gross sales. Lentzner, *supra* note 8, at 14-15 (citing Hemingway, *Selected Problems in Leases of Community and Regional Shopping Centers*, 16 BAYLOR L. REV. 1, 12 (1964); Colbourn, *A Guide to Problems in Shopping Center Leases*, 29 BROOKLYN L. REV. 56, 60, 70 (1962)).

24. Lentzner, *supra* note 8, at 14.

25. *Id.* at 15. *Cf. id.* at 2 n.5 ("[t]he effect of [a radius clause] is to restrict desirable tenants to a certain shopping area and prevent them from generating customer interest in nearby competitive centers").

26. *Id.* at 11, 14.

27. *Id.* at 11.

28. Discussing landlords of smaller shopping centers, Mr. Lentzner states without elaborating that "the natural forces of the marketplace provide adequate protection for a landlord from potentially damaging repercussions resulting from tenant overexpansion." *Id.*

29. Note, *Sherman Act Implications of Major Tenant Veto Powers in Regional Shopping Centers*, 29 WASH. & LEE L. REV. 67, 67 (1972). The development of individual units

ping, the developer must assemble a balanced assortment of stores and services³⁰ that in turn generates a volume of customer traffic that inures to the developer's benefit. Use of a radius clause to prevent the opening of a second outlet is one means by which a developer seeks to maintain the balance and thus to ensure that customer volume is not disturbed.

Application of Federal Antitrust Laws to Regional Shopping Center Leases

There are four major federal antitrust statutes: the Sherman Act,³¹ the Clayton Act,³² the Robinson-Patman Act,³³ and the Federal Trade Commission Act³⁴ (FTCA). Because the Clayton Act and the Robinson-Patman Act, itself a part of the Clayton Act, require that the challenged activity be "in commerce"³⁵ and deal only with the sale of commodities, these Acts have no application to restrictive covenants in real estate leases.³⁶

into an integrated whole is the primary distinction between shopping centers and other commercial building enterprises. Note, *Sherman Act Challenges to Shopping Center Leases: Restrictive Covenants as Restraints of Trade Under Section 1*, 7 GA. L. REV. 311, 313 (1973).

30. One of the primary justifications that developers assert for right of approval clauses, clauses controlling the range of goods, and "exclusive" clauses is the need to offer a balanced assortment of merchandise for sale and to foster the "image" of the shopping center as a whole. Lentzner, *supra* note 8, at 38-39.

31. 15 U.S.C. §§ 1-7 (1976).

32. *Id.* §§ 12-27.

33. *Id.* § 13.

34. *Id.* §§ 41-58.

35. In *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974), the Supreme Court stated: "In contrast to § 1 [of the Sherman Act], the distinct 'in commerce' language of the Clayton and Robinson-Patman Act provisions . . . appears to denote only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer. If this is so, the jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities *affect* commerce." *Id.* at 195 (emphasis in original).

36. In determining whether price discrimination in rentals contained in real estate leases was a violation of the Robinson-Patman Act, it was held that a leasehold is not a "commodity" being "sold" within the meaning of the Act. *Plum Tree, Inc. v. N.K. Winston Corp.*, 351 F. Supp. 80, 86-87 (S.D.N.Y. 1972). Furthermore, when considering the problems of price discrimination in shopping center lease rentals, the Senate Select Committee on Small Business concluded: "Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, is not applicable, because it applies to the sale of commodities and not to the leasing of real estate." SENATE SELECT COMM. ON SMALL BUSINESS, THE IMPACT OF SUBURBAN SHOPPING CENTERS ON INDEPENDENT RETAILERS, S. REP. NO. 1016, 86th Cong., 1st Sess. 24

Notwithstanding the fact that real estate traditionally has been considered a local activity,³⁷ restrictive covenants in real estate leases are within the jurisdiction of both the Sherman Act³⁸ and the FTCA.³⁹ Jurisdiction under these statutes extends to activities both "in commerce" and "affecting" interstate commerce,⁴⁰ and these statutes are not limited in applicability to "commodities."⁴¹

Section 1 of the Sherman Act,⁴² which makes illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade,"⁴³ is particularly relevant in the application of the antitrust laws to radius clauses. In order to demonstrate that an act constitutes a violation of section 1, three elements must be shown. First, there must be a joint action involving at least two actors. In cases chal-

(1960), cited in *Antitrust Implications*, *supra* note 10, at 1206 n.19.

37. See, e.g., *Saint Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc.*, 316 F. Supp. 1045 (D. Minn. 1970) (shopping centers are not "in commerce" and do not affect interstate commerce more than incidentally and indirectly). Although real estate transactions now are viewed as potentially affecting commerce, they are still regarded as a local activity not in commerce. See notes 46-61 & accompanying text *infra*. See also *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980) (potential effect on interstate commerce was held possible from financing and title insurance attendant to sales of residential property). Cf. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-85 (1975) (fee schedule for provisions of legal services, although local in nature, affects interstate commerce).

38. 15 U.S.C. §§ 1-7 (1976). The Sherman Act reads in pertinent part: "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal

...

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony" 15 U.S.C. §§ 1-2 (1976).

39. *Id.* § 46.

40. See note 47 & accompanying text *infra*.

41. The Clayton Act, 15 U.S.C. §§ 12-27 (1976), and Robinson-Patman Act, *id.* § 13, by their very language specify that their applicability is limited to activities involving "commodities," whereas the Sherman Act, *id.* §§ 1-7, and the FTCA, *id.* §§ 41-58, are not so limited.

42. Because § 2 of the Sherman Act prohibits monopolies and attempts to monopolize, proof of sufficient economic power is relevant. If monopoly power can be demonstrated, a radius clause might be held to be monopolization conduct protecting the monopoly by forming a barrier to entry. See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (Court, upon proof of sufficient economic power, struck down otherwise legal business practices as monopolization conduct); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922) (same). Because the factual questions involved in establishing monopoly power can only be determined on a case by case basis, potential application of § 2 to radius clauses will not be analyzed in this Article.

43. See note 38 *supra*.

lenging restrictive covenants in leases, this requirement virtually always is met because joint action can always be found between the lessor-developer and the lessee-retailer. The second and third elements require that the contract, combination, or conspiracy restrain trade or commerce and affect interstate or foreign commerce.

Section 5 of the FTCA also may be applied in a radius clause context. Section 5(a)(1) broadly provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are declared unlawful."⁴⁴ This section has been held to proscribe incipient violations of the Sherman Act, conduct that is violative of the policies of the Sherman and Clayton Acts, and even unfair competitive practices beyond the letter or spirit of the Sherman and Clayton Acts.⁴⁵

The Regional Shopping Center and Jurisdiction under the Sherman Act and the FTCA

The first issue in determining the applicability of the Sherman Act and the FTCA to a real estate lease is whether the interstate commerce jurisdictional requirement is met.⁴⁶ Jurisdiction under the Sherman Act can be obtained in either of two situations: when an activity is "in" or "in the flow" of interstate commerce⁴⁷—no matter how minimal its effect—or when an activity not "in" commerce nevertheless materially affects commerce.⁴⁸ In recent cases the courts have adopted an expansive approach in finding an effect

44. 15 U.S.C. § 45(a)(1) (1976).

45. See notes 108-10 & accompanying text *infra*.

46. The Fifth Circuit has held that the jurisdictional issue and questions dealing with the merits can in some cases be so interwoven that they cannot be considered separately and, therefore, that summary disposition on jurisdictional grounds is inappropriate in most antitrust actions. *McBeath v. Inter-American Citizens for Decency Comm.*, 374 F.2d 359, 361-62 (5th Cir. 1967). See generally Comment, *The Confusing World of Interstate Commerce and Jurisdiction under the Sherman Act—A Look at the Development and Future of the Currently Employed Jurisdictional Tests*, 21 VILL. L. REV. 721, 724 (1976).

47. See, e.g., *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 (1976); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235-37 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218, 225 (1947); *Evans v. S.S. Kresge Co.*, 544 F.2d 1184, 1188 (3d Cir.), *cert. denied*, 433 U.S. 908 (1976).

48. See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 233, at 709-11 (1977) [hereinafter cited as SULLIVAN].

on interstate commerce,⁴⁹ and earlier cases involving restrictive lease covenants in which interstate commerce jurisdiction was not found⁵⁰ would probably be decided otherwise today.

Among the various factors considered by the courts in determining the existence of a substantial effect on interstate commerce have been whether the defendant purchases out-of-state supplies, whether the defendant is financed by interstate companies, and whether the defendant is patronized by out-of-state customers.⁵¹ In *Harold Friedman Inc. v. Thorofare Markets Inc.*,⁵² a decision involving the validity of a clause in a shopping center lease providing that the lessor would not lease to any competitors of a tenant supermarket,⁵³ the Third Circuit found sufficient effect on interstate commerce to warrant jurisdiction on the basis of both the decrease and increase of the flow of goods to the respective parties,⁵⁴ out-of-state supplies, retail sales, and loans for remodeling

49. See, e.g., *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Burke v. Ford*, 389 U.S. 320 (1967); *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948); *Ballard v. Blue Shield of S.W. Va., Inc.*, 543 F.2d 1075 (4th Cir. 1976).

50. See, e.g., *Saint Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc.*, 316 F. Supp. 1045 (D. Minn. 1970); *Savon Gas Stations No. Six, Inc. v. Shell Oil Co.*, 203 F. Supp. 529 (D. Md.), *aff'd*, 309 F.2d 306 (4th Cir. 1962) (discussed at note 167 *infra*).

51. E.g., *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976). *Rex Hospital* is instructive because it involved a proposed hospital expansion. Hospitals, like real estate, traditionally have been considered a local activity. The Supreme Court first held that wholly local business restraints can substantially and adversely affect interstate commerce and thereby establish Sherman Act jurisdiction. *Id.* at 743. The Supreme Court then found that the petitioner's purchase of out-of-state medicines and supplies, its revenues from out-of-state insurance companies, management fees paid to its out-of-state parent company, and the multimillion dollar financing of the proposed expansion together substantially affected interstate commerce. *Id.* at 744. That the effect was indirect and fortuitous rather than purposely directed at interstate commerce did not place the conduct at issue outside the scope of the Sherman Act. *Id.* The Court also found that the conduct's effect on interstate commerce can be "substantial" even if it "falls far short of causing enterprises to fold or affecting market price." *Id.* at 745.

52. 587 F.2d 127 (3d Cir. 1978).

53. The plaintiff in *Friedman* operated seven "Foodland" supermarkets under a franchise from Fox Grocery Company. The defendant owned and operated a chain of seventy-five supermarkets in Pennsylvania, West Virginia, and Ohio, and had negotiated a clause prohibiting the lessor from leasing to a competing supermarket chain. The defendant had secured similar "exclusive" clauses in most of its leases at other locations. The plaintiff alleged a violation of § 1 of the Sherman Act by Thorofare and by the shopping center's managing agent. *Id.* at 130-31.

54. The court noted that effect on interstate commerce may be shown by increases in the flow of goods as well as by decreases in the flow of goods caused by the anticompetitive

obtained out-of-state.⁵⁵ The court further reasoned that "when a large interstate supermarket chain is in the picture, anticompetitive activities . . . will inevitably have a substantial effect"⁵⁶ on interstate commerce. The fact that the clause was in nearly all of the defendant's leases was a secondary consideration.⁵⁷ Finally, the court relied on a perceived congressional intent that Sherman Act jurisdiction be coextensive with the commerce clause, "and consequently, the reach of the Sherman Act expands with each extension of the commerce power."⁵⁸ As currently construed, the court noted, the reach of the commerce power is broad.⁵⁹

Applying similar reasoning, whenever any store that is a part of an interstate chain is involved in litigation, interstate commerce jurisdiction will likely be found. Such outlets of interstate chains, as well as interstate development companies, are likely to be involved with a regional shopping center. Depending on the facts of the particular situation, plaintiffs may also establish jurisdiction by asserting that customers are from out-of-state, advertising is interstate, insurance premiums are paid to interstate companies, financing is by out-of-state lenders, and that both purchases of supplies and retail sales affect interstate commerce.⁶⁰ The determination of whether the interstate commerce element is met depends upon a rigorous analysis of the specific facts of each case.⁶¹ Partic-

conduct. *Id.* at 132.

55. *Id.* at 132-33. Where the restraint involves a continuing impact on trade as opposed to an isolated impact, there is a greater likelihood that an effect upon interstate commerce will be found. *See Evans v. S.S. Kresge Co.*, 544 F.2d 1184, 1190 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

56. 587 F.2d at 136.

57. *Id.* at 134.

58. *Id.* at 135. *See also Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 n.2 (1976).

59. 587 F.2d at 135. *See also McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980); *Wickard v. Filburn*, 317 U.S. 111 (1942).

60. A radius clause could well be a standard provision in all leases of a defendant developer. However, the jurisdictional hurdle can be met irrespective of whether the restriction is uniformly put into the developer's leases. Although a standard form lease was used in both *Harold Friedman Inc. v. Thorofare Mkts. Inc.*, 587 F.2d 127 (3d Cir. 1978), and in *Evans v. S.S. Kresge Co.*, 544 F.2d 1184 (3d Cir.), *cert. denied*, 433 U.S. 908 (1976), no such factor was present in *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976), on which both decisions rely.

61. *Harold Friedman Inc. v. Thorofare Mkts. Inc.*, 587 F.2d 127, 132 (3d Cir. 1978). The court in *Friedman* stated: "Substantiality of effect . . . is to be viewed on a case-by-case, practical economic basis, from the perspective of whether the local activity has a significant impact on competition in commerce and whether the commerce so affected is substantial in volume." *Id.* Cf. Note, *Sherman Act Challenges to Shopping Center Leases*:

ularly where a regional center or a national chain is involved, the interstate commerce jurisdictional hurdle can probably be met.

Towards a Standard: The Need to Apply a Rule of Reason Analysis to Radius Clauses

To demonstrate an unlawful restraint of trade under section 1 of the Sherman Act, two distinct modes of analysis have evolved: a rule of reason and a per se rule. The rule of reason analysis was developed by the United States Supreme Court in *Board of Trade of the City of Chicago v. United States*⁶² in which the Court stated:

[E]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.⁶³

A rule of reason analysis thus considers the purpose and history of a restraint on trade in balancing the positive and negative effects on competition that the restraint produces.

In contrast to a rule of reason analysis, a per se doctrine holds certain practices to be so inherently anticompetitive that they are illegal irrespective of justification. The standard for per se violations as presently applied was developed by the Supreme Court in *Northern Pacific Railway v. United States*.⁶⁴

Restrictive Covenants as Restraints of Trade Under Section 1, 7 GA. L. REV. 311, 326 (1973) ("a case-by-case evaluation makes more difficult the task of determining independently of a particular factual setting whether or not certain shopping center lease provisions have a substantial effect upon interstate commerce").

62. 246 U.S. 231 (1918). The analysis was first announced in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

63. 246 U.S. at 238.

64. 356 U.S. 1 (1958). The Court first declared that certain agreements were illegal per

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.⁶⁵

The practices that have been held to be *per se* violations of section 1 are pricefixing,⁶⁶ certain group boycotts,⁶⁷ tying arrangements,⁶⁸ and horizontal divisions of markets.⁶⁹ As the above-quoted language indicates, the *per se* approach is applicable to avoid complex problems of proving the unreasonableness of a particular restraint only in cases where previous experience with such arrangements has established their overwhelmingly "pernicious effect" on competition as well as the lack of any offsetting redeeming value.⁷⁰

Radius Clauses are not within Any of the Four Categories Accorded Per Se Treatment

The radius clause does not fit into any of the four categories

se in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

65. 356 U.S. at 5.

66. *E.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

67. *E.g.*, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941).

68. *E.g.*, *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *International Salt Co. v. United States*, 332 U.S. 392 (1947).

69. *E.g.*, *United States v. Topco Assocs.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

70. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). Compare *White Motor Co. v. United States*, 372 U.S. 253, 261 (1963) (Court finding that it could not apply a *per se* standard to vertical market allocation agreements because of an absence of judicial experience with such agreements) with *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967) (applying a *per se* standard to a vertical market allocation arrangement) and *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50-59 (1977) (overruling *Schwinn* and criticizing that decision for a failure to apply "the demanding standards of *Northern Pac. R. Co.*").

traditionally defined as per se violations of the Sherman Act.⁷¹ Radius clauses do not constitute a form of pricefixing, because a radius clause merely restricts the retailer from opening a second outlet nearby, without any discernible effect on price. Moreover, no intention to tamper with the pricing mechanism, a factor that has given rise to per se illegality,⁷² is reflected in radius clauses. In this regard, radius clauses should be distinguished from shopping center lease provisions restricting a tenant's price range or excluding discounters. These latter provisions do affect price and therefore should be subject to a per se standard.⁷³

Secondly, the inclusion of a radius clause in a lease cannot be viewed as a tying arrangement⁷⁴ under the Sherman Act⁷⁵ be-

71. However, FTC consent decrees have banned some restrictive covenants that have been construed as per se illegal. See notes 121-48 & accompanying text *infra*. The issue of the antitrust implications of radius clauses was raised in two lawsuits in the early 1970's. In *Plum Tree, Inc. v. Rouse Co.*, 343 F. Supp. 667 (E.D. Pa. 1972), class certification was denied when the trial court held that Plum Tree was an inappropriate representative of the proposed class. The substantive issues subsequently were resolved in a consent decree, which did not enjoin radius clauses. See *Rouse Co.*, 85 F.T.C. 848 (1975).

In the second suit, *Plum Tree, Inc. v. N.K. Winston Corp.*, 351 F. Supp. 80 (S.D.N.Y. 1972), the trial court was not optimistic that the plaintiff could overcome the jurisdictional barrier, but, in refusing to dismiss the claim, the court conceded the possibility of success. *Id.* at 88. The case was settled before the merits were ever reached. See Katz, *Reasons Behind \$1-Billion Suits*, SHOPPING CENTER WORLD, June, 1972, at 23; Kucker, *The Pitfalls of the Plum Tree Argument*, SHOPPING CENTER WORLD, Aug., 1972, at 44; Lentzner, *supra* note 8, at 33 n.116.

72. See *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-98 (1927); *National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421, 426 (7th Cir. 1965).

To emphasize the radius clause's lack of effect on price, the defendant could argue that a radius clause prohibiting a tenant from opening another outlet in a nearby shopping center permits a competing retailer to open a similar outlet in the second location. See also notes 130-33 & accompanying text *infra*.

73. See Eagle, *supra* note 1, at 630. Where the major tenant or developer is seeking a high-quality image for a shopping center, however, it can be argued that a clause which grants a right to exclude retailers who would detract from the ambience of the mall is necessary and only incidentally affects price. See *id.* at 631. But see Halper, *The Antitrust Laws Visit Shopping Center "Use Restrictions,"* 4 REAL EST. L.J. 3, 11, 12 (1975) (arguing that a restriction against discount merchandising is a form of pricefixing) [hereinafter cited as Halper]. Cf. Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193, 1202-03 (1973) (right of approval clauses are areas of potential abuse; "[t]he danger . . . is that broad veto provisions will be used to police the pricing policies of present or prospective tenants"). See also the *Gimbel Brothers* consent decree in note 129 *infra*.

74. A tying arrangement is "an agreement by a party to sell one product . . . on the condition that the buyer also purchases a different (or tied) product . . ." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

cause two distinct products are not tied together by the operation of such clauses. The developer is "selling" the rental of the location on the condition that the retailer not "purchase" a second outlet within a specified distance from the first outlet. The retailer is not required to buy a second "product" from the developer. Instead, the retailer is only precluded from "buying" another lease from third parties within a geographic locale defined by the radius. Mr. Lentzner's analysis, which views the leasehold premises as the tying product and the agreement not to compete nearby as the tied product⁷⁶ fails to consider that "[t]he very nature of the tying concept presupposes that there are distinctive and discernible products or services which a buyer ought to be able to obtain alone, if he wishes."⁷⁷ The radius clause does not qualify as a "distinctive and discernible product." In fact, the argument that radius clauses or similar restrictive covenants in leases constitute tied products, when "[c]arried to its logical conclusion . . . mean[s] that 'all conditions in leases, and hence all leases, are tying arrangements merely because they embody conditions reciprocally exchanged.'"⁷⁸

Furthermore, tying cases typically have involved only situations in which the tying and tied products were purchased or leased by the same party.⁷⁹ In executing a shopping center lease, the lease is purchased by the retailer and the radius clause is "bought" by the developer for its own benefit. This arrangement is more akin to reciprocal dealing than to a tying arrangement, and reciprocal dealings have not as yet been ruled per se violations of the Sherman Act.⁸⁰

Radius clauses also normally do not constitute per se illegal horizontal market allocations.⁸¹ A retailer's consent to a radius

75. Section 3 of the Clayton Act, 15 U.S.C. § 14 (1976), which also prohibits tying arrangements, is inapplicable to a real estate lease, because the lease is not a commodity and is not "in commerce." See notes 35-36 & accompanying text *supra*. See also Eagle *supra* note 1, at 608-09.

76. See Lentzner, *supra* note 8, at 64.

77. SULLIVAN, *supra* note 48, § 155, at 443.

78. *Antitrust Implications*, *supra* note 10, at 1217 n.70 (quoting Complaint, Counsel' Memorandum of Legal and Factual Issues at 27, Tyson's Corner Regional Shopping Center No. 8886 (F.T.C., filed May 8, 1972)).

79. *Id.*

80. See SULLIVAN, *supra* note 48, § 171, at 493-94.

81. A horizontal market allocation is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972). While a radius clause is a vertical market allocation, an agreement between a major tenant and other tenants to limit the range, either

clause in a lease raises the same issues associated with any allocation of markets. Because the agreement runs between the developer and the tenant, it is a vertical arrangement.⁸² In defining a market allocation agreement as per se illegal, however, it is the horizontal nature of the restraint, not the form of the arrangement, that is determinative. For example, in *United States v. Topco Associates, Inc.*,⁸³ the arrangement between the purchasing cooperative and its members was vertical. The challenged restraint, however, resulted in a horizontal division of markets, which rendered it per se illegal.⁸⁴

Radius clauses do not create a horizontal market allocation between the tenant-retailer and its competitors within the shopping center⁸⁵ because the pernicious effect on competition created by horizontal market allocations arises from agreements not to compete within certain geographic areas, and such agreements cannot

in price or in quality, of goods sold in the shopping center is a horizontal agreement. Similarly, any agreement among the major tenant and other retailers granting one of them an "exclusive" is a horizontal market agreement. See Halper, *supra* note 73, at 11, 14-15.

82. If the developer happens also to be the major tenant, the agreement might seem to be a horizontal allocation with respect to goods in which the developer and retailer compete, and therefore per se illegal. The issue of whether a horizontal market allocation or a vertical market allocation has taken place must be resolved. In *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), the factor held to distinguish horizontal restrictions from vertical restrictions was "whether the territorial arrangements . . . are . . . the creature of the licensor . . . or . . . the product of a horizontal arrangement among the licensees." *Id.* at 352. A market division among distributors would be considered a horizontal arrangement only if the system were organized or imposed by the distributors. See *United States v. Topco Assocs.*, 405 U.S. 596, 608-09 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350, 352-54 (1967); *White Motor Co. v. United States*, 372 U.S. 253, 267 (1963) (Brennan, J., concurring). However, because a radius clause is imposed by the developer, who has the dual role of major tenant, it could be categorized as a vertical restriction. See Denger, *Vertical Restrictions: The Impact of Sylvania*, 46 ANTITRUST L.J. 908, 916 (1977). See also notes 85-90 & accompanying text *infra*.

83. 405 U.S. 596 (1972). The *Topco* case involved a joint venture of approximately 25 small and medium sized regional supermarket chains organized to obtain "high quality merchandise under private labels." *Id.* at 599. The ancillary agreement, entered into by all members of the association, designated each member's territory in which it could sell *Topco* products. *Id.*

84. *Id.* at 608. Similarly, in *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), the vertical licensing arrangement between Sealy and its manufacturer-licensees provided that the licensor covenanted with each manufacturer not to grant any other licenses within a designated area and the licensees in turn promised not to operate beyond their designated areas. *Id.* at 352. Again the Court, looking beyond the vertical form of agreement, found a horizontal territorial restraint. See Comment, *The Shopping Center Radius Clause: Candidate for Antitrust?*, 32 Sw. L.J. 825, 847-48 (1978). See note 82 *supra*.

85. Comment, *The Shopping Center Radius Clause: Candidate for Antitrust?*, 32 Sw. L.J. 825, 848 (1978).

reasonably be implied by the presence of a radius clause.⁸⁶ Each lease containing a radius clause is independently negotiated by the developer and the tenant. The terms of radius clauses are not uniform in every lease. A stronger, more desirable tenant is able to bargain for a less restrictive clause or for its total elimination.⁸⁷ Competing retailers thus do not participate in a comprehensive scheme of market allocation. In fact, the retailer remains in competition with its competitors at the shopping center. A radius clause restriction is imposed in order to maintain the retailer's competitive strength at the original location. In reality, the radius clause represents the retailer's agreement not to compete with its own business in the vicinity of the shopping center.

Notwithstanding the radius clause, the retailer has complete access to all customers in the locale, but only from one location. The radius clause thus appears analogous to a "location clause"⁸⁸ imposed by a manufacturer on a dealer. Viewed as a location clause, the validity of the radius clause is governed by *Continental T.V., Inc. v. GTE Sylvania Inc.*,⁸⁹ which applies a rule of reason analysis.⁹⁰

86. See note 82 & accompanying text *supra*.

87. While larger and more desirable tenants are able to negotiate over the inclusion or terms of a radius clause, single stores and small chains lack the bargaining power to challenge or modify the radius clause. Lentzner, *supra* note 8, at 18. Small tenants are dissuaded from challenging the clauses by judicial precedent upholding restrictive covenants of these kinds, the enormous expense of legal remedies, and fear of antagonizing a landlord with whom the retailer must deal for many years. *Id.* at 40 n.144. Stronger tenants, on the other hand, have been able to eliminate or to modify radius clauses to reduce the radius from five to ten miles to two or three miles and the duration from ten to twenty years to two to five years. *Id.* at 18.

88. A "location clause" is an agreement "that a dealer can sell anywhere to any class of customers, but only from locations approved by the manufacturer . . ." Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 14 (1978). While nonprice vertical restraints such as location clauses, territorial allocations and customer allocations are considered vertical restraints with respect to a manufacturer's distribution network, the rationales applied in considering the legality of these restraints are analogous to those applicable in determining the legality of covenants in a shopping center lease. In considering the legality of the provisions of a shopping center lease, however, there is no issue of sacrificing intrabrand competition to enhance interbrand competition. See note 90 & accompanying text *infra*.

89. 433 U.S. 36 (1977).

90. *Id.* at 59. It can be argued that radius clauses are distinguishable from location clauses, and, therefore, that *Sylvania* is not controlling, because the sole "product" at issue is floor space in the shopping center, and this "product" is homogeneous among all competitors. Therefore, unlike *Sylvania*, there is no increased interbrand competition to offset the harm to intrabrand competition. Furthermore, it can be argued that the radius clause is broader restriction than the location clause; the radius clause limiting the retailer to or

A radius clause also could be viewed as an exclusive dealing contract in which the retailer covenants with the developer that the developer's shopping center will be the retailer's exclusive "supplier" of space within the given radius. Such exclusive dealing contracts, however, have not been held to the stringent per se standard.⁹¹

Whether or not viewed as location clauses or exclusive dealing contracts, leases containing radius clauses are analogous to vertical territorial restraints. Such vertical market restraints are not per se violations but are judged under a rule of reason.⁹² Additionally, radius clauses should not be treated as per se illegal under the Court's analysis in *Topco* because their effects are not uniformly anticompetitive. Rather, radius clauses have procompetitive effects because they serve to strengthen a retailer's position at its original location.⁹³

Finally, radius clauses should not be held per se illegal as group boycotts.⁹⁴ Collective boycotts that have been condemned as per se violations of the Sherman Act typically involve an agree-

outlet in a particular locale is analogous to a manufacturer restricting a dealer's freedom to sell both the manufacturer's own product as well as all competitors' corresponding products. Nevertheless, the radius clause is a vertical nonprice restriction which should be judged under a rule of reason standard. Although interbrand competition is not increased, the radius clause does have "redeeming virtues" rendering a per se analysis inappropriate. The radius clause protects the percentage lease, the cornerstone of real estate financing, and strengthens the retailer's position at the first location. See text accompanying note 93 *infra*.

91. See *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). In determining the legality of the exclusive dealing agreement in *Tampa Electric*, a case brought under § 3 of the Clayton Act, the Court considered the duration of the contract, the effect of the agreement on the relevant market, industry customs, and the purpose of the agreement. *Id.* at 333-34.

92. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977). *Sylvania* held that location clauses, like other nonprice vertically imposed restraints, were to be judged under a rule of reason. *Id.* See generally Louis, *Vertical Distribution Restraints after Sylvania: A Postscript and Comment*, 76 MICH. L. REV. 265 (1977); Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1 (1978); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977). Under a rule of reason analysis, the court must consider whether the restraint is ancillary to a legitimate business purpose and, if so, whether the restriction is reasonably necessary to accomplish that legitimate business purpose. See notes 161-62 & accompanying text *infra*.

93. See *Antitrust Implications*, *supra* note 10, at 1210.

94. Boycotts are "concerted efforts by traders at one level to keep others out or inhibit their competitive efforts at that level by making it more difficult for them to find what traders at that level need, usually suppliers or customers but sometimes access to transactions with other traders at the same level." SULLIVAN, *supra* note 48, § 83, at 232. See Eagle, *supra* note 1, at 605-08.

ment among parties at one level of commerce to exclude another party on the same level of commerce.⁹⁵ Although a developer of a second shopping center could charge the developer of the original shopping mall and the retailers who agreed to a radius clause with a "boycott" of the second shopping center, the charge would be difficult to support. The horizontal element necessary to establish an illegal boycott is absent because there is no agreement among traders at one level of commerce not to deal with another party at the same level of commerce.⁹⁶

A boycott also requires a finding of collective action.⁹⁷ The existence of an agreement between the developer and any one retailer-tenant is apparent from their action in entering into a lease. The fact that a developer enters into a series of leases containing radius clauses with individual retailers does not itself, however, establish a collective agreement among all of the retailers involved. Although the Supreme Court held in *Interstate Circuit, Inc. v. United States*⁹⁸ that a conspiracy can be inferred by course of conduct, mere conscious parallelism⁹⁹ alone does not support such an inference.¹⁰⁰ To demonstrate the interdependence of seemingly individual decisions it must be proven¹⁰¹ that the act of the individual retailers in entering into a lease containing a radius clause was not merely a similar response to the same conditions, unrelated to the other retailers' conduct;¹⁰² this burden of proof is traditionally difficult to meet.

Boycotts and concerted refusals to deal are per se illegal only

95. *E.g.*, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941). See also Note, *Sherman Act Implications of Major Tenant Veto Powers in Regional Shopping Centers*, 29 WASH. & LEE L. REV. 67, 71 (1972).

96. See note 94 *supra*.

97. One element of a violation of § 1 of the Sherman Act is joint action. See text accompanying note 43 *supra*.

98. 306 U.S. 208 (1939).

99. Conscious parallelism involves knowingly engaging in activities that are similar to the activities of one's competitors. See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939). See generally Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 656 (1962).

100. *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962). See also *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954).

101. See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 321-25 (1939).

102. See *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 543-44 (1954).

where the exclusion is aimed at destroying competition.¹⁰³ Although radius clauses may present a barrier to a rival developer's business by making unavailable certain tenants for its stores, there is no direct interference with the competitor-developer's business, and the restraint is not so severe as to threaten the competitor with elimination.¹⁰⁴ Thus, radius clauses do not constitute per se illegal boycotts.¹⁰⁵

The FTC Consent Decrees Do Not Mandate a Per Se Analysis by the Courts

The FTC, vested with sole jurisdiction to bring actions under section 5 of the FTCA,¹⁰⁶ has been the most active critic of shopping center leases containing restrictive covenants in recent years.¹⁰⁷ The FTC has relied on the FTCA to assume jurisdiction over incipient violations of the Sherman Act,¹⁰⁸ practices that conflict with the basic policies of the Sherman and Clayton Act,¹⁰⁹ and unfair competitive practices beyond the letter or spirit of the Sherman and Clayton Acts.¹¹⁰

FTC procedures culminating in consent decrees must be distinguished from judicial decisions. The FTC initiates action by issuing a formal complaint upon a vote by the entire Commission.

103. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959). See also *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

104. But see *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), cert. denied, 344 U.S. 817 (1952) (using a per se standard for a discretionary leasing policy aimed at competitors). Right of approval, no discount store, and exclusive clauses, however, could constitute a boycott or refusal to deal.

105. Radius clauses do not seem to be the type of restraint that courts find appropriate for applying the per se rule against collective boycotts. The agreements are not generally in the tenant's interest, but are made for the developer's benefit to protect the percentage rent. See notes 21-28 & accompanying text *supra*. Further, individual refusals to deal—the so-called “trader's prerogative”—are permissible. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Finally, although it is a boycott for a store to deny its competitors access to a shopping center, a radius clause is not directed at a retailer's competitor. In fact, a radius clause is not directed *against* any specific entity. See notes 85-91 & accompanying text *supra*. It merely restricts a retailer to a specific location within the given radius.

106. 15 U.S.C. § 45(a)(1) (1976 & Supp. III 1979). Section 5 declares unlawful “[u]nfair methods of competition in or affecting commerce.” *Id.*

107. *Lentzner*, *supra* note 8, at 46-47.

108. See *FTC v. Cement Inst.*, 333 U.S. 683, 693 (1948).

109. See *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966). See also *Lentzner*, *supra* note 8, at 48 n.171.

110. See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972). See also *Lentzner*, *supra* note 8, at 48 n.171.

The formal complaint may lead to a settlement with a resultant consent order.¹¹¹ The consent decree is not an admission of wrongdoing and is without precedential value in subsequent judicial proceedings;¹¹² it is binding only with respect to the party involved. The consent order is, however, precedent with respect to future FTC actions.¹¹³ Any violation of a consent order is punishable by a civil fine of up to \$10,000 for each violation.¹¹⁴ If no settlement is reached, the case is decided by a hearing examiner,¹¹⁵ whose ruling may be reversed by the Commission.¹¹⁶ The Commission's decision may in turn be appealed to the federal courts.¹¹⁷ Once a violation is found, the FTC issues a cease and desist order, the violation of which can result in fines of up to \$10,000 a day.¹¹⁸

In recent years, the FTC has issued complaints against some of the nation's largest shopping center tenants and developers.¹¹⁹ In order to understand fully the impact of and procedures involved in FTC consent decrees involving shopping center lease provisions, several recent decrees will be discussed. Several of the complaints challenged covenants granting the right of approval over leasing arrangements to three major department stores which enabled the stores to exclude discounters from Tysons Corner Regional Shopping Center.¹²⁰

*Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*¹²¹ was the first case filed in federal court dealing with a

111. P. AREEDA, *ANTITRUST ANALYSIS* ¶ 158(b) (2d ed. 1974). See FEDERAL TRADE COMMISSION, ORGANIZATION, PROCEDURES, RULES OF PRACTICE AND STANDARDS OF CONDUCT, *Consent Order Procedure* §§ 2.31-.34 (1979). See also ABA ANTITRUST SECTION, ANTITRUST CONSENT DECREE MANUAL (1979).

112. 15 U.S.C. § 16(a) (Supp. III 1979); Lentzner, *supra* note 8, at 48 n.173. Final orders of the FTC are admissible as prima facie evidence of wrongdoing in private treble damage suits. See generally Annot., 10 A.L.R. Fed. 307 (1972).

113. Lentzner, *supra* note 8, at 48 n.173.

114. 15 U.S.C. § 45(l) (1976).

115. See FEDERAL TRADE COMMISSION, ORGANIZATION, PROCEDURES, RULES OF PRACTICE, AND STANDARDS OF CONDUCT, *Consent Order Procedure* §§ 2.31-.35 (1979); Lentzner, *supra* note 8, at 48 n.173.

116. Lentzner, *supra* note 8, at 48 n.173.

117. 15 U.S.C. § 45(c) (1976). Review is by the court of appeals in any circuit in which the defendant does business. *Id.*

118. *Id.* § 45(1). Such sanctions are exceptional, however. Lentzner, *supra* note 8, at 48 n.173.

119. See notes 121-48 & accompanying text *infra*.

120. Tysons Corner Regional Shopping Center, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,532 (F.T.C. 1974). See notes 121-23 & accompanying text *infra*.

121. 308 F. Supp. 988 (D.D.C.), *aff'd*, 429 F.2d 206 (D.C. Cir. 1970). The leases gave

"right of approval" clause, specifically a "no discounter" clause.¹²² A discount appliance store that was denied admission to the mall located in Fairfax County, Virginia, by two department stores alleged a group boycott by the developer and the major tenants¹²³ in violation of sections 1 and 2 of the Sherman Act.¹²⁴ When the lease provisions were upheld by the court,¹²⁵ the FTC reacted by issuing a complaint on a group boycott theory, expressly rejected in *Dalmo Sales*, as well as charging that the power to exclude potential competitors raised the issue of pricefixing.¹²⁶ Ultimately, all three department stores were subjected to FTC investigation and surrendered their veto power over admission of new tenants.¹²⁷

At about the same time, the FTC also began examining contracts between Gimbel Brothers Department Store and various developers granting Gimbels broad powers of tenant approval in shopping centers in which Gimbels maintained a store.¹²⁸ The *Gimbels* consent order,¹²⁹ typical of the settlements sought by the

major tenants a right to approve tenants not on a list of 465 approved stores. 308 F. Supp. at 990.

122. 308 F. Supp. at 990-91.

123. The defendants were Tysons Corner Regional Shopping Center (the developer), the May Department Stores Company, the Hecht Company (a department store operated by the May Company), Woodward & Lothrop, Inc., and City Stores Company (which operated an outlet in the mall). *Id.* at 989. It was Hecht Company and Woodward & Lothrop that had actually disapproved Dalmo's admission. *Id.* at 992-93.

124. 15 U.S.C. §§ 1-2 (1976).

125. 308 F. Supp. at 994-95.

126. Ultimately the suit was settled without a determination on the merits. *See* Final Order to Cease and Desist, Tysons Corner Regional Shopping Center, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,532 (F.T.C. 1974); Lentzner, *supra* note 8, at 49 n.175.

127. *See* Final Order to Cease and Desist, Tysons Corner Regional Shopping Center, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,532 (F.T.C. 1974). *See also* Tysons Corner Regional Shopping Center, 85 F.T.C. 970 (1975) (a cease and desist order against City Stores, a tenant of Tysons Corner).

128. *See* Gimbel Bros., Inc., 83 F.T.C. 1320 (1974). Other consent decrees were issued in Food Fair Stores, Inc., 86 F.T.C. 709 (1975), and Rouse Co., 85 F.T.C. 848 (1975). *See* Halper, *supra* note 73, at 8.

129. The final consent decree most representative of the FTC's current policy on the types of radius clauses that are considered per se illegal is Gimbel Bros., Inc., 83 F.T.C. 1320 (1974). The order prohibits Gimbel Brothers from making any agreement that: "1. grants respondent the right to approve or disapprove the entry into a shopping center of any other retailer; 2. grants respondent the right to approve or disapprove the amount of floor space that any other retailer may lease or purchase in a shopping center; 3. prohibits the admission into a shopping center of any particular retailer or class of retailers, including, for purposes of illustration: (a) other department stores, (b) junior department stores, (c) discount stores, or (d) catalogue stores; 4. limits the types of merchandise or brands of merchandise or service which any other retailer in a shopping center may offer for sale; 5. specifies that any other retailer in a shopping center shall or shall not sell its merchandise or services at

FTC, substantially curtailed practices such as right of approval, but allowed certain other practices to continue despite their failure to conform with previously expressed FTC policy.¹³⁰ In particular, the consent order permitted Gimbels to prohibit rental of shopping center space to "objectionable" tenants such as shops dealing in pornographic material or topless bars.¹³¹ The order also gave the major tenant a right of approval under the "ice-cream wrapper rule,"¹³² a right to approve or reject a tenant in the immediate vicinity of the tenant's door without having to justify the decision on the "clearly objectionable" standard, provided such exclusions are not based on price ranges, price lines, trade names, store names, trademarks, or brands.¹³³ The *Tysons Corner* decree went further by permitting major tenants to sign leases requiring that the developer consider the objective of a balanced and diversified group of

any particular price or within any range of prices; 6. grants respondent the right to approve or disapprove the location in a shopping center of any other retailer; 7. specifies or prohibits any type of advertising by other retailers, other than advertising within a shopping center; 8. prohibits price advertising within a shopping center by retailers . . . in such a way as to make it difficult for customers to discern advertised prices from the common area of such shopping center; or 9. prevents expansion of a shopping center." *Id.* at 1324-25.

The FTC had attacked as per se violations of the antitrust laws lease clauses containing the following restrictions: "(a) fixing, controlling, and maintaining retail prices; (b) allowing major tenants to choose their competitors and to exclude actual and potential competitors; (c) eliminating discount advertising and discount selling; (d) denying the public the benefit of price competition; (e) boycotting potential satellite tenant entrants to the shopping center; and (f) restricting, hindering, and coercing the developer in his choice of potential tenants in the shopping center." Complaint at ¶ 11, *Tysons Corner Regional Shopping Center*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,003, at 22,004 (F.T.C. 1974). Similar lease restrictions were challenged in *Rich's, Inc.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,118 (F.T.C. 1976). See Schear & Sheehan, *supra* note 3, at 616-20.

The most recent shopping center consent decree was announced on January 17, 1979. See *Federated Department Stores*, [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,505 (F.T.C. 1979). In *Federated*, the FTC charged that department stores of the Federated chain had excluded discounters and other potential competitors from shopping centers in which the Federated stores were located. Although Federated did not admit to any violations of law, it did agree to consent to an order prohibiting any agreement with a shopping center developer that enabled the department store to: "(1) select its fellow tenants in a shopping center; (2) dictate the services or merchandise brands offered by other tenants; (3) dictate the prices charged by other stores in the shopping center; (4) prohibit price advertising by other tenants; (5) unreasonably influence the location or amount of space in the shopping center allocated to other tenants; and (6) unreasonably interfere with the use of property adjacent to the shopping center." *Id.* at 21,536. This agreement is not a final order.

130. 83 F.T.C. at 1325-26.

131. *Id.* at 1326. See Eagle, *supra* note 1, at 622-23.

132. 83 F.T.C. at 1325-26.

133. *Id.*

retail stores in selecting other tenants.¹³⁴

An additional limitation on the impact of these recent consent decrees is evidenced by the fact that the proscribed practices are outlawed only in particular types of shopping centers.¹³⁵ For example, Gimbels remained free to engage in any of the practices prohibited by its consent decree whenever it opened an outlet in a shopping center containing less than 200,000 square feet of floor area or in a shopping center with only one major tenant and less than 50,000 square feet of floor area occupied by satellite tenants.¹³⁶

In 1976, the FTC announced its first consent order involving a radius clause.¹³⁷ The order forbade the Strawbridge & Clothier department store from making any agreement which "[e]stablishes or maintains a radius or distance from shopping centers within which a retailer may not operate another store similar to or in competition with that retailer's own store at the shopping center."¹³⁸ The prohibition, however, applied to the department store as a tenant and not as a developer and therefore was only directed against the horizontal aspects of the clause at issue.¹³⁹

A more comprehensive decree dealing with radius clauses was issued against Sears, Roebuck & Company,¹⁴⁰ ordering Sears to cease and desist from imposing radius restrictions on any of its tenants,¹⁴¹ both in its role as a major tenant and as a developer.¹⁴²

134. Tysons Corner Regional Shopping Center, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,532, at 20,465 (F.T.C. 1974).

135. See, e.g., Gimbel Bros., Inc., 83 F.T.C. 1320, 1324 (1974).

136. *Id.* See Halper, *supra* note 73, at 18.

137. See Strawbridge & Clothier, 87 F.T.C. 593 (1976).

138. *Id.* at 601.

139. Lentzner, *supra* note 8, at 52.

140. Sears, Roebuck & Co., 89 F.T.C. 240 (1977). The prohibitions again apply only to large shopping centers. The order prohibits Sears as a major tenant from making or enforcing any agreement that: (a) prohibits entry into centers of particular tenants or classes of tenants or allows Sears to approve tenant entry; (b) grants Sears the right to approve other tenants' floor space or their use of it; (c) specifies that tenants must sell merchandise at any particular price, or within any range of prices, fashion, or quality (when the latter terms connote price); (d) limits discount advertising, pricing, or selling; (e) limits the types of merchandise or services which other tenants may sell; (f) prescribes minimum hours of operation; (g) grants Sears the right to approve tenant location; or (h) provides for radius restrictions upon tenants. Other provisions of the order prohibit Sears as a developer from controlling prices of other tenants' merchandise, imposing radius restrictions, or conditioning tenant entry upon that tenant's agreement to occupy space in other Homart Centers. *Id.* at 249-50.

141. *Id.* at 249.

142. *Id.* at 250.

Because the FTC's strategy has been to proceed against the larger targets as an example to the rest of the industry,¹⁴³ the *Sears* decree provides guidance as to the FTC's position on shopping center lease provisions.

Insofar as the *Sears* decree prohibited use of the radius clause without regard to the nature of the retailer's business or to the geographic or time limits involved, many shopping center owners have inferred that the FTC holds radius clauses to be illegal per se.¹⁴⁴ Nevertheless, an FTC spokesman stated that the *Sears* decree should not be construed as an FTC decision that radius clauses were per se violations.¹⁴⁵ Rather, it reflects a reaction to the particular clauses at issue, not the FTC's position generally.¹⁴⁶ In fact, FTC members seem to be divided on the appropriate way to deal with radius clause restrictions. One official has stated that while the *Strawbridge & Clothier* order reflects the position of the FTC towards radius clauses in certain *regional* malls, it appears

143. Lentzner, *supra* note 8, at 55-56. In response to charges that the FTC policy of "selective enforcement" has been unfair, the FTC announced its intention to promulgate a comprehensive set of rules governing shopping center lease provisions to apply equally to all developers and major tenants in the country. See *Wall Street Journal*, Jan. 26, 1977, at 34, col. 1; FTC Bureau of Competition Considers Regulating Competition by Rulemaking, *ATR News & Comment* (BNA) No. 793 A-23, Dec. 14, 1976, cited in Lentzner, *supra* note 8, at 56 n.199. However, these rules were never promulgated because the consent orders were found to be sufficiently specific.

144. Lentzner, *supra* note 8, at 57 n.203.

145. Statement of David Laufer, Senior Trial Attorney, Bureau of Competition, reprinted in *International Council of Shopping Centers, Newsletter*, June, 1977, at 10, col. 2, quoted in Lentzner, *supra* note 8, at 57. Apart from the issue of whether radius clauses were held to a per se or rule of reason analysis, Mr. Laufer stated that the status of exclusive clauses, locations clauses, and use provisions was unsettled. Lentzner, *supra* note 8, at 57 n.201. However, he further indicated that the *Tysons Corner* cases resolved that tenant approval clauses, no-discounter clauses, and any clause involving price interference or advertising prohibitions were illegal. *Id.*

146. Mr. Laufer stated: "Many of you have complained privately of the provisions in the *Sears*' order prohibiting *Sears* from imposing radius restrictions on tenants. Your legitimate concern is that the provision may mean that the FTC considers radius restrictions illegal per se, a position contrasting sharply with current case law, which requires radius clauses to be examined under a rule of reason analysis. While I share your concern, I don't think the FTC's action in either *Sears* or *Strawbridge & Clothier* . . . is incompatible with the case law. Remember, *Sears* and *S & C* are consent agreements . . . Also . . . the staff . . . probably felt that the facts warranted the prohibitions; that is, the clauses in these cases were unreasonable. I hasten to add that this is my own view, and I could be wrong about the Commission's ultimate position . . . [A]ll you can really say right now is that the Commission has not been presented with the opportunity to say whether or not it holds radius restrictions illegal per se." *International Council of Shopping Centers, Newsletter*, June, 1977, at 10, 15, quoted in Lentzner, *supra* note 8, at 58 n.204.

that the FTC would uphold certain radius clauses in smaller shopping centers under a rule of reason analysis.¹⁴⁷ A second official, however, believed that the FTC might take a *per se* approach to radius clauses, viewing such restrictions as horizontal territorial restraints.¹⁴⁸

The FTC's reliance on informal settlements to accomplish its objectives has obviated the need for a definitive legal theory on which to base its actions. The FTC has not been forced, therefore, to determine whether a *per se* or rule of reason analysis should be applied to radius clauses.¹⁴⁹ The recently enacted Bankruptcy Reform Act of 1978,¹⁵⁰ however, provides support for the position that Congress has indicated that a rule of reason analysis is appropriate in determining whether radius clauses violate the Sherman Act. Section 365(b)(3) of the Act states that:

adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance . . . that assumption or assignment of such lease will not breach substantially any provision, such as a radius, location, use, or exclusivity provision, in any other lease, financing agreement, or master agreement relating to such shopping center¹⁵¹

Although Congress did not expressly intend to immunize restrictive covenants from *per se* illegality under the Sherman Act, recognition of the use of radius clauses in the language of the Bankruptcy Act—promulgated after the possibility of a *per se* standard of illegality was raised in FTC proceedings—arguably implies that Congress did not intend that a *per se* standard be applied in cases challenging the legality of radius clauses.

Finally, the fact that the FTC asserts a *per se* theory and negotiates consent decrees carries no judicial weight.¹⁵² These settlements are resolved on the basis of negotiation, not on the strength of legal analysis. The consent orders are law only with respect to

147. Letter from Daniel C. Schwartz, Assistant Director for Evaluation at the Bureau of Competition, FTC, to Jay Lentzner (Aug. 20, 1976), *reprinted in part in* Lentzner, *supra* note 8, at 52 n.187.

148. Letter from Harvey Dzodin to Jay Lentzner (Aug. 11, 1976), *reprinted in part in* Lentzner, *supra* note 8, at 52 n.187. Mr. Dzodin is an attorney with the FTC.

149. Lentzner, *supra* note 8, at 52 n.187. Staff determinations, on which settlements are based, are not official FTC decisions and are not the equivalent of binding judicial resolutions. *Id.* See notes 111-18 & accompanying text *supra*.

150. 11 U.S.C. §§ 1-151326 (Supp. III 1979).

151. *Id.* § 365 (Supp. III 1979). This section in general deals with the termination, assumption, assignment, and rejection of executory contracts and leases.

152. See notes 111-18 & accompanying text *supra*.

future FTC actions.¹⁵³

Regional Shopping Centers as Joint Ventures

A regional shopping center—a “single, integrated retail community”¹⁵⁴—is analogous to a joint venture,¹⁵⁵ typified by an interdependence and cooperation among the developer, major tenants, and satellite tenants, with each retailer in turn generating customers for the other.¹⁵⁶ Joint ventures characteristically establish entrance requirements for membership,¹⁵⁷ and set mutual limitations on members’ freedom to deal with outsiders.¹⁵⁸ Radius clauses exemplify the limitations on freedom to deal, while right of approval and exclusive clauses are examples of entrance requirements.

Because some desirable goals and essential services are realized only through joint ventures,¹⁵⁹ courts have used a rule of reason analysis to judge the validity of joint ventures and of any re-

153. See note 113 & accompanying text *supra*.

154. Note, *Sherman Act Implications of Major Tenant Veto Powers in Regional Shopping Centers*, 29 WASH. & LEE L. REV. 67, 67 (1972). The regional shopping center has been recognized as a joint merchandising venture. See SENATE SELECT COMM. ON SMALL BUSINESS, THE IMPACT OF SUBURBAN SHOPPING CENTERS ON INDEPENDENT RETAILERS, S. REP. NO. 1016, 86th Cong., 1st Sess. 6, 8 (1960), cited in *Antitrust Implications*, *supra* note 10, at 1206 n.19.

155. A joint venture is defined as “an association of persons [or companies] with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge, without creating a partnership or a corporation . . .” 46 AM. JUR. 2d *Joint Ventures* § 1, at 21-22 (1971).

156. A shopping center may be viewed as a quasi-cooperative venture in which the various stores form a common identity to attract customers to their “one-stop” shopping service. Lentzner, *supra* note 8, at 15. “Probably the greatest advantage to being a part of a shopping complex is that a tenant’s presence along with the collection of other business establishments will attract a variety of customers . . . which no single store could accomplish on its own.” *Id.* at 15-16. By opening a second outlet at another shopping center, the tenant would divert potential business from the other retailers in the shopping center. *Id.* at 15. See notes 29-30 & accompanying text *supra*.

The joint venture aspect of a shopping center also is enforced by the existence of a merchants’ association as well as by assessment of common area costs, promotion fees, taxes, and cooperative advertising. Lentzner, *supra* note 8, at 15 n.45.

157. See, e.g., *Associated Press v. United States*, 326 U.S. 1, 21 (1945). See generally Comment, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 18 VILL. L. REV. 721, 736-42 (1973).

158. Comment, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 18 VILL. L. REV. 721, 737 (1973).

159. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933). For a discussion of the difficulties involved in the financing of shopping center developments and the inherent interdependence of tenants and developer, see notes 15-30 & accompanying text *supra*.

straints on trade which they impose.¹⁶⁰ The courts have scrutinized refusals to deal by members of a joint venture under the rule of reason because the restraint is viewed as ancillary to the agreement creating the joint venture and necessary to the primary purpose of the joint venture.¹⁶¹ Any effect on third parties generally is incidental to the primary objective of the joint venture.¹⁶² Radius clauses are necessary to effectuate the lawful purpose of maximizing sales volume and customer traffic at the shopping center and, therefore, should be judged under a rule of reason.¹⁶³

Judicial treatment of restrictive covenants in shopping center leases further indicates that radius clauses are analogous to the type of restrictive covenants contained in joint venture agreements and thus should not be held to be per se violations. In *Dalmo Sales*,¹⁶⁴ the district court upheld the validity of a "no discounteer" right of approval provision under a rule of reason analysis.¹⁶⁵ Simi-

160. Comment, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 18 VILL. L. REV. 721, 737 (1973). Most decisions on concerted refusals to deal by joint ventures have been based on membership exclusions. See, e.g., *Associated Press v. United States*, 326 U.S. 1 (1945); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), cert. denied, 344 U.S. 817 (1952). While a regional shopping center usually is essential to a retailer because there is no other shopping center within the same trading area, the retail tenants withheld from a second developer by a radius clause are not likely to be vital to the developer because of the significant numbers of other potential tenants.

161. See *Associated Press v. United States*, 326 U.S. 1 (1945). Under the doctrine of ancillary restraints, a trade restraint which, standing alone, would be illegal under a rule of reason may be lawful if reasonable and necessary to aid an otherwise lawful arrangement. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282-83 (6th Cir. 1898), modified and aff'd, 175 U.S. 211 (1899). See also *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231 (1918). If, however, the ancillary agreement standing alone would be per se illegal, the fact that there is an underlying valid joint venture may not save the restraint. See note 83 *supra*.

162. See Barber, *Refusals to Deal under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 876-77 (1955).

163. Radius clauses also have been justified as necessary to protect the capital risked by all involved in the shopping center. See Lentzner, *supra* note 8, at 16. A final rationale justifying the use of radius clauses is that not only have such restrictions on expansion been enforced for years, but similar restrictive covenants have traditionally been enforced in business. See Eagle, *supra* note 1, at 598 nn.88-91; Lentzner, *supra* note 8, at 12. Radius clauses are said to be based on covenants-not-to-compete which have long been inserted in contracts for the sale of a business. Lentzner, *supra* note 8, at 12, 24 n.79, 25 nn.85-88. In fact, courts have generally recognized that in every land sale contract there is an implied covenant of good faith requiring the parties to refrain from doing anything to deny the benefits of the agreement to the others. *Id.* at 16 n.49.

164. 308 F. Supp. 988 (D.D.C.), aff'd, 429 F.2d 206 (D.C. Cir. 1970). See notes 121-25 & accompanying text *supra*.

165. 308 F. Supp. at 990-91.

larly, courts have, with one exception, upheld the use of "exclusive clauses"¹⁶⁶ under a rule of reason analysis.¹⁶⁷ Even in *Pay Less Drug Stores Northwest, Inc. v. City Products Corp.*,¹⁶⁸ the sole case in which an exclusive clause in a shopping center lease was struck down, the court reached its result under a rule of reason, not a per se analysis.¹⁶⁹ Because the courts have uniformly ex-

166. For a description of "exclusive clauses," see note 8 & accompanying text *supra*. See generally Baum, *Lessors' Covenants Restricting Competition*, 1965 U. ILL. L.F. 228; Note, *Restrictive Covenants in Shopping Center Leases*, 34 N.Y.U.L. Rev. 940 (1959). See, e.g., J.M. Fields of Anderson, Inc. v. Kroger Co., 310 F.2d 562 (5th Cir. 1962).

167. E.g., *Borman's Inc. v. Great Scott Super Mkts., Inc.*, 433 F. Supp. 343 (E.D. Mich. 1975); *Savon Gas Stations No. Six, Inc. v. Shell Oil Co.*, 203 F. Supp. 529 (D. Md.), *aff'd*, 309 F.2d 306 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963). *Savon* is considered the most authoritative statement by a federal court on the validity of exclusive clauses. Lentzner, *supra* note 8, at 34 n.120. In *Savon* a lease granting defendants the exclusive right to sell gasoline adjacent to a shopping center was held not to violate the Sherman Act. The lease between Shell and the landlord contained a covenant that prohibited the landlord from renting any of its remaining property in the vicinity to a second gas station and that guaranteed direct access from the shopping center to the service station. Two years later, the landlord leased space to Savon on the other side of the shopping center with similar direct access to the parking lot. When Shell objected, the landlord erected a barrier between the Savon station and the shopping center. Savon's sales fell, and it brought suit.

The Fourth Circuit upheld the validity of the exclusive clause, recognizing that the economic viability of a shopping center depended on the proper mix of tenants and that the granting of an exclusive right to sell certain products was sometimes necessary to create this proper balance of tenants. 309 F.2d at 309. The circuit court also found that because 10 major service stations were located within a three block radius of the shopping center, commerce had not been injured. *Id.* at 309-10. There was no evidence of pricefixing or of boycotting a competitor. *Id.* at 310. Interestingly, the Fourth Circuit held that the defendant had not interfered with Savon's business because customers could still obtain the plaintiff's services by using public streets. *Id.* at 310.

In *Borman's*, a more recent case, a preliminary injunction was granted to enjoin a competing supermarket from obtaining access to a shopping center. Borman's had brought an antitrust action to invalidate the partial exclusive clause contained in Great Scott's lease in the neighborhood shopping center. The covenant was held to be valid under a rule of reason analysis. 433 F. Supp. 349-50. The court emphasized that the small shopping center involved already had two grocery stores. *Id.* at 351. The court held that, in order to prevail, the plaintiff would have to prove that the exclusion denied reasonable market alternatives and was an unreasonable restraint. *Id.* at 351. Because Borman's did in fact have other stores in the area, and therefore was not completely excluded from the area, the court in dicta suggested that Borman's could not prevail in the lawsuit. State courts also have not applied a per se standard to restrictive covenants in leases. See, e.g., *Benjamin's of Dover, Inc. v. Jardel Co.*, 289 A.2d 642, 644 (Del. Ch. 1972); *Utica Square, Inc. v. Renberg's, Inc.*, 390 P.2d 876, 880-81 (Okla. 1964); *Nieman-Marcus v. Hexter*, 412 S.W.2d 915, 917-18 (Tex. Civ. App. 1967).

168. 1975-2 Trade Cas. (CCH) ¶ 60,385 (D. Ore. 1975). In *Pay Less*, the defendant was a national variety store chain. Its lease prohibited the landlord from renting any space within 3000 feet of one of its stores to any competitor.

169. *Id.* Significantly, the competitor had no other preexisting location, and the shopping center was the only effective means by which it could compete.

amined these lease restrictions under a rule of reason, it would be anomalous not to treat radius clauses in a similar manner.

Applying the Rule of Reason to Radius Clauses

In applying the general principles of a rule of reason analysis¹⁷⁰ to radius clauses, the reasonableness of the distance and duration limitations depends in part on the reasonableness of the radius clause's specific terms.¹⁷¹ This inquiry considers whether the restraint is broader than necessary for the protection of the developer;¹⁷² whether the restraint imposes undue hardship on the retailer; and whether the benefit to the developer outweighs any injury to the public.¹⁷³ If a standard radius clause is inserted in all of the developer's leases and no effort is made to tailor those terms to the individual needs of the tenant or to the specific circumstances of the shopping center, a finding of unreasonableness is more likely.

Radius clauses generally are not viewed as injurious to the public because preventing the existing retailer from opening a second outlet encourages other competitors to open a store in the locale.¹⁷⁴ Furthermore, the public always has access to the existing location. Rather, the clauses have been viewed in terms of injury to the retailer. Weighed against the developer's justifications for ra-

170. See notes 62-63 & accompanying text *supra*. According to Professor Handler, the measure of the reasonableness of an agreement not to compete may be the same test applied to restrictions in employment contracts and sales contracts. M. HANDLER, H. BLAKE, R. PRTOFSKY & H. GOLDSCHMID, *CASES AND MATERIALS ON TRADE REGULATION* 43-45 (1975).

171. Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants under Federal Law*, 73 COLUM. L. REV. 1193, 1193 (1973). It is more likely that the radius clause will be validated if the developer includes terms permitting the retailer to establish a second location if sales from that outlet are included in the calculation of the percentage rent at the first location, or permitting renegotiation of the base rent. See Comment, *The Shopping Center Radius Clause: Candidate for Antitrust?*, 32 SW. L.J. 825, 852-53 (1978).

172. This includes a determination of the reasonableness of the clause's distance and duration limitations.

173. Not only is the size of the center relevant, but the concentration of alternative shopping centers in the immediate area is important. Where numerous stores in an area deal in comparable merchandise, sufficient marketing alternatives exist to negate an anticompetitive effect. See Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants under Federal Law*, 73 COLUM. L. REV. 1193, 1196 (1973).

174. INTERNATIONAL COUNCIL OF SHOPPING CENTERS, *THE SHOPPING CENTER INDUSTRY AND ANTITRUST LAWS* 13 (1973) (proceedings of a law conference held at Safety Harbor, Fla., Oct. 17-19, 1972) (remarks of Albert Sussman) *quoted in* Lentzner, *supra* note 8, at 16 n.50.

dius clauses,¹⁷⁵ the tenant's potential argument that the "the developers' reliance on a radius provision as a competitive edge is misplaced, since it is the qualitative identity of the shopping center as a whole, and not the isolation of a component retailer that will most affect consumer traffic."¹⁷⁶ Tenants assert that the use of radius clauses does not prevent outside competition and therefore does not enhance the center's drawing power. Instead, the clause merely restrains competition by tenant-retailers.¹⁷⁷

Tenants also have maintained that the landlord who restricts a tenant to one location creates a weaker tenant less able to survive in today's market,¹⁷⁸ because "[t]o operate successfully it is important for the retailer to be in the key suburban shopping centers in his trade area."¹⁷⁹ Furthermore, tenants argue that the utility of the clauses is limited. As developers have modified their radius clauses to make them "more reasonable" and able to withstand scrutiny by the FTC,¹⁸⁰ both time and area restrictions have been reduced,¹⁸¹ and thus most clauses are in effect only during the early years of an outlet's development. Because of start-up costs and lack of established clientele, percentage rental revenues are likely to be smallest during these early years.¹⁸² Moreover, it is argued that these early years during which a radius clause would be in effect are when a retailer would be least likely to undertake expanding to a second location.¹⁸³ Thus, tenants argue the radius clause is in effect during the period when it is least significant.¹⁸⁴

175. See notes 21-27 & accompanying text *supra*.

176. Lentzner, *supra* note 8, at 17. See generally *id.* at 17-24. One survey of three California shopping centers concluded that the success of the venture depended on economic factors, not the imposition of a radius clause. *Id.* at 18-19. In fact, some retailers who opened second outlets in rival centers did not lose more sales than the retailers who continued to operate only in the first location and some who opened stores in a second shopping center increased sales at the first location. *Id.* at 19. Mr. Lentzner concludes that when a geographic market can support more than one shopping center and when the older center maintains its consumer appeal, an individual retailer can successfully operate from both locations. *Id.* at 19. His survey, however, was based on a very small sample and its reliability, therefore, may be questioned.

177. *Id.* at 21.

178. *Id.* at 24.

179. *Id.*

180. *Id.* at 23. See notes 106-18 & accompanying text *supra*.

181. Lentzner, *supra* note 8, at 23. Radius clauses usually extend two to five miles and are in effect for the first five years of the lease. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

On the other hand, if it can be argued that a clause is in effect only during the years when it has the least impact, it can also be said that such a clause does not constitute an effective restraint on competition.

Finally, tenants argue that it is inconsistent for a landlord to bind tenants with a radius clause and at the same time surround them with numerous competitors in like goods and services within the same shopping complex.¹⁸⁵ However, the very retailers who complain that radius clauses imposed by landlords are restraints in violation of antitrust laws often demand similar restrictive covenants for their own protection. For example, retailers often demand exclusive clauses—which are simply the reverse of radius clauses—limiting competition in the goods or services to be offered for sale by that retailer.

The radius clause often bears on other terms of the lease, for example, the amount of base rent¹⁸⁶ and percentage rent provisions. The classic common law argument justifying ancillary restraints—that the cost of such restrictions is reflected in the contract price¹⁸⁷—is therefore applicable. Although Mr. Lentzner argues that the omission of a radius clause has no effect on the remainder of the lease,¹⁸⁸ his statement is largely unsupported. His argument that decisions as to potential future expansion cannot correctly be made on the basis of market conditions at the time of the lease and therefore should be left to the tenant to determine when there is sufficient demand for an additional outlet¹⁸⁹ is similarly flawed. In fact, contractual terms routinely are established at the time of agreement and have always reflected this problem of predicting future market conditions. Furthermore, if tenants were truly able to determine when market conditions support expansion, retail businesses would be likely to have a lower rate of fail-

185. *Id.*

186. Without the protection to rents afforded by radius clauses, landlords might be forced to increase the base rent. Higher minimum rents would in turn force out small tenants who could not afford higher prices. *Id.* at 65.

187. *See id.* at 60.

188. Mr. Lentzner also believes that radius clauses are of little benefit to landlords. *Id.* at 61. He states that "radius clauses are unreasonable restraints of trade that do not serve the public, do little or nothing to enhance the economic position of the landlord, and unfairly weaken the ability of tenants to compete vigorously in the marketplace. . . . [T]he appropriate legal remedy would be to eliminate radius restrictions through the application of a per se rule." *Id.* at 61.

189. *Id.* at 63.

ure than they presently do.

Conclusion

The tenant who has availed itself of the benefits of a developed shopping center¹⁹⁰ should not then complain of reasonable restraints imposed in the interests of the joint venture as a whole. The retailer's decision to locate in the mall reflects an awareness that a shopping center will attract significantly more trade than a retailer operating alone in another setting would be able to attract.¹⁹¹ Both the developer and retailers who have put their money at risk have a vested interest in the shopping center's ability to function as an integrated unit for maximum success. This interdependence creates the need for mutual limitations on the members' freedom to deal with outsiders. Such restraints should be viewed as ancillary and necessary to the primary purpose of the joint venture between the developer and its tenants.

190. See *Antitrust Implications*, *supra* note 10, at 1210.

191. Note, *The Shopping Centre Lease*, 35 U. TORONTO FACULTY L. REV. 107, 107 (1977).